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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1967

No. 1068

LEONARD THOMPSON,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Court of Appeal of the State of California, First Appellate District, Division One, was filed on June 28, 1967, and is reported in *People v. Thompson*, 252 A.C.A. 76, 60 Cal.Rptr. 203 (1967). The opinion is reproduced in Appendix I of the Petition for Writ of Certiorari. Petitioner's petition for hearing in the Supreme Court of the State of California was denied on September 21, 1967.

JURISDICTION

Jurisdiction is invoked under 28 U.S.C. 1257 (3). However, the questions sought to be presented here were neither raised in nor ruled on by the court below, and there has been no compliance with Rule 23(1)(f), Revised Rules of the Supreme Court. Therefore, jurisdiction should be declined.

QUESTIONS PRESENTED

I

Whether the right to trial by jury in state criminal proceedings is guaranteed by the Fourteenth Amendment.

II

Whether the trial judge's comment on the evidence is a deprivation of the right to trial by jury.

III

Whether the trial judge's comment on the evidence is a deprivation of the right to an impartial jury.

IV

Whether such comment, if error, is prejudicial.

STATEMENT OF THE CASE

Following trial by jury, petitioner was convicted of kidnapping for the purpose of robbery (Calif. Pen. Code § 209); assault with a deadly weapon on a peace officer (Calif. Pen. Code § 245b); possession of a firearm by a

convicted felon (Calif. Pen. Code § 12021); and two counts of robbery (Calif. Pen. Code § 211).

The facts adduced at trial in this case are as follows:

Shortly before 10:00 p.m. on May 19, 1965, Dr. and Mrs. Alexander Riskin were present in their home, 120 Belgrave, San Francisco. With them was their daughter-in-law, Marilyn, who at this time was talking by telephone to her husband, Stephen Riskin, in Los Angeles (RT 33).

In response to the ringing of the front door bell, Mrs. Riskin came down the stairs from her bedroom and opened the door (RT 34). As she did so, Dr. Riskin, who had followed her down the stairs, observed her switching on the porch light which went off almost immediately, and opening the door (RT 75). Two men pushed their way into the house. The first man to come in wore a dark green toggle coat with a ski mask over his face, and carried a gun (RT 34, 36, 75, 76, 78). The second man wore no mask at this time, and carried a large knife (RT 36, 76).

As the men entered, Mrs. Riskin started screaming (RT 34, 76). The man with the gun said, "Shut up; shut up or I will kill you," but she continued to scream (RT 34:23-25). The man then put his hand over her mouth and pushed her to the floor. He also told Dr. Riskin to sit down on the floor (RT 35, 76). Dr. Riskin asked the men not to hurt her because she was just home from the hospital. One of the men replied, "We know all about it. We saw it in a newspaper and that is why we are here." (RT 37:4-10). The man with the knife admonished them, "Don't look up; don't look up." (RT 37:24; 76:26). During this time Marilyn informed her husband about the robbery. He then called the San Francisco police (RT 137-38).

One of the men then went into the living room, came back with Marilyn, and put her down on the floor next to Dr. and Mrs. Riskin. At this time the second man also had a mask on (RT 38, 76, 77). The second man told them that the first man was dangerous, "Don't cross him. He needs a fix. Have you got any morphine?" (RT 79:25-26).

The men then asked where the money and the jewels were (RT 38). Mrs. Riskin replied, "Upstairs in the bedroom." (RT 39:2). The man pointed the gun at Marilyn and told her to go up and show him. Mrs. Riskin testified:

> "I said, 'She is just a visitor. She doesn't know where anything is. This is my house and, I know where it all is. I will go,' and I got up and he was a couple of steps up ahead of me, and I started up. And our stairs go around like this (indicating), and when I got to the curve, I turned around and looked down and saw my husband and Marilyn sitting on the floor and the man with the knife standing over them, and the man with the gun who was ahead of me on the stairs said, 'Come on, come on,' waving the gun, and so I turned and followed him up the stairs. And we went into the bedroom." (RT 39:9-20). See RT 52.

In the bedroom, the man took some items from Dr. Riskin's trousers, including his little pocket knife, his watch, keys, and some bills from a wallet and put them in his pockets. During this time Mrs. Riskin was extremely upset, "rather hysterical." (RT 40). They then went downstairs to the dinette where the man took some change from Mrs. Riskin's purse, went from there to the living room, then back to the entry where Mrs. Riskin again had to sit on the floor with her husband and daughter-in-law (RT 41-42).

At this time there was a knock on the door. Marilyn asked, "Who is it?" When the answer was, "Police," the men said, "Don't open the door." (RT 42:23-25). Marilyn opened the door, and the police came in as the two men ran out the door toward the back (RT 43).

On the night of May 19, 1965, at about 10:00 o'clock, Officers Frank G. Kerlin and Burt Olsen of the San Francisco Police Department were assigned to a radio car. They received a call that there was a burglary in progress at 120 Belgrave (RT 83). As the officers arrived, they checked the address with communications, then went to the front door and rang the doorbell. There seemed to be some confusion, then a voice stated "See who it is," and a female voice asked, "Who is it?" When the officers replied "Police," a shouting male voice said to get away from the door (RT 84).

The officers then banged on the door and demanded entrance. The door opened and a young woman ran past them. The officers went into the hallway and observed the doctor and his wife lying on the floor. Standing in the doorway, eight to ten feet away from them, was a man wearing a blackish-green jacket with light-colored buttons, with a hood over his head. As he saw the officers, he dropped the knife he was carrying and ran through the door (RT 85, 106-07). Mrs. Riskin shouted, "He has got a gun. He will kill you. Be careful. He will kill you." (RT 85:16-18).

Officer Kerlin followed the man through the door, about twenty feet behind him. As he rounded the doorway he saw the man at the foot of the stairs; the man who had pulled the hood off looked back toward the officer. Officer Kerlin observed that he was a Negro with a thick growth or

shadow beneath his nostrils. He shouted twice at him to halt or he would shoot, and as the man ran through the trees, the officer fired a shot after him (RT 87, 109-10).

Officer Kerlin then told his partner that they would follow the suspect in the police car. Officer Olsen stayed with the Riskins while Officer Kerlin returned to the car and went down Shrader Street (RT 88). He advised communications that he was in pursuit of the robbery suspect (RT 89). He observed the suspect running, but lost him in the vicinity of Shrader and Alma Streets. As he stopped at this intersection after driving around the block without again seeing the suspect, Officers Clark and Gerrans arrived (RT 90).

These two officers were on duty in a radio car and heard Officer Kerlin's report to communications (RT 121). They proceeded towards Shrader and Alma when they heard the suspect had been lost in that area (RT 122). After learning from Officer Kerlin that the suspect possibly went in the schoolyard (RT 123), Officer Gerrans went around the outside of the school, while Officer Clark went into the schoolyard (RT 124, 142). Both officers were in uniform (RT 125, 141).

As Officer Gerrans went into the backyard of 1257 Shrader in the course of this search, he heard a rustling noise in the bushes. Proceeding further, using his flashlight, he saw peering at him a person who then went into the front yard at 1241 Shrader. Officer Gerrans called out to him that it was the police and to come out with his hands up (RT 124, 143). The officer then put both his gun and flashlight away and climbed the wire fence that separated the yards at 1257 and 1241 Shrader Street (RT 125). As he took his

flashlight out and shined it over the bush area, petitioner came out (RT 126). In the meantime Officer Clark had also climbed the fence into the yard (RT 143).

Petitioner carried a knife and lunged at Officer Gerrans, cutting him on the left hand. At this time the officer had his flashlight in his right hand, but had not had the opportunity to take his gun from his holster. The officer and petitioner fell to the ground. During the scuffle, both officers struck petitioner and eventually were able to put handcuffs on him (RT 128, 143). Petitioner was wearing a dark green toggle jacket, identified at trial as the type of coat worn by the first of the two men who forced their way into the house (RT 36, 144).

The officers then led petitioner out of the yard and brought him to the police car. Officer Kerlin walked over to the car, and identified petitioner as the man he had observed on the stairway because he had on the greenish black jacket with the toggle buttons, was a Negro, and had a thick mustache underneath his nostrils (RT 91-92).

Petitioner was placed in the police car (RT 93). Then, observing petitioner squirming around in the back seat of the car, the officers considered the possibility that a gun had been concealed and pulled him from the car (RT 94). Two ladies' rings, a pair of men's cuff links, some money and a metal key ring and keys were found on and beneath the seat from which petitioner had been taken (RT 94, 144-46). The jewelry and keys were identified as the Riskins' (RT 55-57, 77-78).

Officer Clark searched petitioner and found a number of objects identified at trial as those taken from the Riskin house (RT 55-57, 77-78): a leather key case with three keys,

a pocket knife marked, "Riskin", a necklace and some bills were found in petitioner's trousers pocket; a watch was found on his wrist (RT 144-46, 147). Later that night, Officer Kerlin returned to the yard and found a pair of gloves at the spot the struggle with petitioner took place (RT 130). He saw no other objects in the yard (RT 133).

Bradley Thomas, a 10-year-old boy who lived at 124 Shrader Street had observed the capture of petitioner from inside his home (RT 69-70). The next day, May 20, 1965, playing in his yard, he found a loaded gun with its barrel pointed into the ground, then called the police (RT 65-66). In response to Bradley's call, Officer Kerlin and three other officers went to the yard and took the gun. Bradley had also found a cigar, a cigarette butt and an officer's pen, but did not find any items of men's clothing in the yard (RT 68).

Also on May 20, 1965, Inspector Emile Dutil of the San Francisco Police Department went to petitioner's hotel room, Room 24 of the Ascot Hotel on Market Street, (RT 60), and found a .38 colt bullet casing in an attache case which was lying on the bed (RT 192-93). Charles Fontan, a criminologist in the San Francisco crime laboratory testified that in his opinion, after tests, the bullet casing had been fired by the gun found in the yard at 1241 Shrader Street (RT 202-03, see RT 195-203).

Petitioner himself was the only witness for the defense. He testified that he had never been in the Riskin home (RT 211). He stated that he was in the area because he was supposed to meet a man named James Bensen in a bar on Carl Street (RT 227). As he was looking for Bensen, a man ran by and threw the coat down (RT 228). Petitioner picked up the coat because it was better than his, then went

into the yard at Shrader Street to try on the coat, taking off his own jacket to do so. He felt a gun in the pocket, took it out and threw it in the bushes (RT 213). He heard cars, then hid in the bushes because he was scared (RT 214). He stated that when the flashlight was pointed at him he put his hands over his head and came out (RT 215). The officers made him kneel down and pushed his face in the mud (RT 218), then struck him in the mouth breaking the wire in his false teeth. This wire cut his mouth and the officer's hand (RT 219). He also stated that the officers hit him several times in the yard and again at the police station (RT 220, 223).

After all the evidence had been presented, the judge included in his charge to the jury the following comment:

> "By the constitution of this state, a Judge of this Court presiding at the trial of a criminal action is authorized, within proper bounds, to comment on the evidence and testimony and the credibility of any witness.
>
> "It is the opinion of this court based upon the evidence in this case that the defendant, Leonard Thompson, has been proved beyond a reasonable doubt to be guilty of each of the charges of the indictment. The charges of the indictment, now, are Count One, charges him with kidnapping to commit robbery, a violation of 209 of the Penal Code; Counts Two and Three charge the defendant with robbery against Mrs. Riskin and Dr. Riskin, respectively. Count Four charges the defendant with an assault with a deadly weapon upon a peace officer, and Count Five charges him with possession of a firearm capable of being concealed upon the person while at a time when the defendant had been previously convicted of a felony.

Now, I caution you that it is your right and your duty to exercise the same independence of judgment in weighing my comment on the evidence as you are entitled to exercise in weighing the testimony of any witness and the arguments of counsel.

"You will keep in mind that you are the exclusive judges of the credibility of the witnesses and of all questions of fact submitted to you. Such authority as the trial judge has to express his personal thoughts on any of these matters is confined to the sole purpose in aiding you in arriving at a verdict and may not be used, and is not used in this case, to impose his will upon you or to compel a verdict." (RT 258).

SUMMARY OF RESPONDENT'S ARGUMENT

Petitioner was convicted by the unanimous verdict of a twelve-man jury. On appeal, the court found error under California law in the comment of the judge that, in his opinion, based on the evidence, petitioner had been proved guilty beyond a reasonable doubt. The error was considered harmless, under the California Constitution, because the evidence was overwhelming. No federal constitutional issue was raised or decided at trial or on appeal. We submit that petitioner has not met the burden of establishing the jurisdictional prerequisite for review by this Court.

Petitioner's arguments that the judge's comment infringed a federal constitutional right to a jury trial and right to an impartial jury are without merit. This Court has consistently held that a right to trial by jury in criminal proceedings is not so fundamental and essential to a fair trial that it is applicable to the states through the Four-

teenth Amendment. It cannot logically be said that a common law jury is the only fair method of adjudicating guilt. The only reason advanced for applying such a right to state criminal proceedings is that it is contained in the Sixth Amendment. This argument overlooks not only the fact that the due process standard is a fair trial, not the Sixth Amendment, but the obvious difference between the Sixth Amendment's guarantee of the incidents of a fair trial and the Third Article's guarantee of jury trial. To hold that a jury trial is essential to due process would promote not fundamental liberty but arbitrary rigidity.

Moreover, the comment complained of does not infringe upon the right to a jury trial. Comment on the evidence is as essential an incident of the common law jury trial as twelve men and a unanimous verdict. There has been no infringement of the right to trial by an impartial jury because the comment complained of relates only to the relationship between judge and jury.

Finally, even if the comment is error under the federal constitution, it was harmless in this case, not just beyond a reasonable doubt but to a near certainty. Evidence of guilt was tantamount to undisputable. Thus, the issuance of a writ of certiorari to review this case could afford no relief to this petitioner even if the constitutional issue is decided as he urges.

ARGUMENT

Petitioner was convicted by the unanimous verdict of a twelve man jury in accordance with the California Constitution which, in Article I, section 7, provides:

> "The right of trial by jury shall be secured to all, and remains inviolate; but in civil actions three-fourths of the jury may render a verdict. A trial by jury may be waived in all criminal cases, by the consent of both parties, expressed in open court by the defendant and his counsel, and in civil actions by the consent of the parties signified in such manner as may be prescribed by law. In civil actions and cases of misdemeanor, the jury may consist of 12, or of any number less than 12 upon which the parties may agree in open court.[1]

The California Constitution also provides:

> "The court may instruct the jury regarding the law applicable to the facts of the case, and may make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case. The court shall inform the jury in all cases that the jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of the witnesses." Art. VI, § 19 (now Art. IV, § 10).

Pursuant to this provision, the trial judge commented on the evidence as quoted in the statement of the case. On appeal, the Court of Appeal found this comment to be error in accordance with *People v. Brock*, 66 Cal.2d 645, 649-55, 58 Cal.Rptr. 321, 426 P.2d 889 (1967), decided by the California Supreme Court while the instant appeal was pend-

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[1]Offenses not felonies are misdemeanors in California. Calif. Pen. Code § 17. Since there are no "petty offenses," the right to jury trial in California is more extensive than that right in the federal system.

ing. The court, however, affirmed the conviction in the instant case under the California harmless error rule on the basis that the evidence, although "essentially circumstantial," was overwhelming and, in view of the defense made, "tantamount to evidence which indisputably" established guilt.[2]

On these facts, petitioner now urges that the comment of the court was a deprivation of his right to jury trial and that this right is guaranteed under the Fourteenth Amendment. In addition, he argues that the comment deprived him of a trial by an impartial jury. Therefore, the argument continues, the court erred in affirming the conviction because such error is either prejudicial *per se* or not harmless under the federal standard set forth in *Chapman v. California*, 386 U.S. 18 (1967). In our view, all of these contentions are not only without merit, they are not properly before this Court because they were not raised, argued or decided in the state court proceedings.

I

JURISDICTION SHOULD BE DECLINED.

This Court has jurisdiction to review cases arising in the state courts only when a "title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of . . . the United States." 28 U.S.C. 1257(3). Rule 23(1)(f) of the Revised Rules of the Su-

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[2] "[I]t cannot be said that there was a miscarriage of justice, since it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of the error. *(People v. Watson*, 46 Cal.2d 818, 836; Calif. Const., Art. VI, § 13)."

preme Court provides that the petition for writ of certiorari, in the statement of facts, must specify the stage and method of raising the federal issues and the way in which they were passed on by the state courts. This petitioner has completely failed to do; and indeed cannot do for obvious reasons.

First, no objection to the comment was made in the trial court. Secondly, on appeal, the allegation of error was made on the basis that this comment was error under California law, because it could have been considered by the jury to be an advised verdict. The only reference to federal constitutional law was the oblique suggestion that comment on the evidence was cast into doubt by this Court's decision in *Griffin v. California,* 380 U.S. 609 (1965) (comment on defendant's failure to testify), largely because both kinds of comment were authorized by the same provision of the California Constitution.[3]

While the appeal in this case was pending, the California Supreme Court issued its opinion in *People v. Brock, supra,* ruling that the identical comment at issue here was not authorized by the state constitution because:

> "Rather than aiding the jury in properly considering the case, such a comment may prevent it from doing so." *Id.* at 651.

While the court in *Brock* reviewed federal law on comment, citing, *inter alia, United States v. Murdock,* 290 U. S.

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[3]Only in his petition for hearing in the California Supreme Court did petitioner specifically raise a question of deprivation of a right to trial by jury under the federal constitution. This, of course, is too late for the purpose of establishing jurisdiction in this Court since the State Supreme Court denied the petition and thus did not reach the merits of the questions raised.

393 (1933), the decision was not based on federal constitutional law, nor was there any discussion of the Sixth and Fourteenth Amendments.[4]

Thus, in accordance with the decision in *Brock*, the Court of Appeal found the comment to be error in the instant case, but in the circumstances, non-prejudicial. In reaching this decision, the Court of Appeal stated:

> "In *Brock, supra*, the Supreme Court, although holding that the error there constituted prejudicial error, recognized that a comment on guilt is not necessarily prejudicial *per se*. We refer to the Supreme Court's application of the California harmless-error rule in reaching this conclusion upon the basis that the evidence was not overwhelming. It is thus apparent that the Supreme Court not only deemed that such error did not violate any federal constitutional right, but also declined to follow the more rigid federal rule that it is improper for a trial judge to state that he believes the defendant guilty unless the undisputed evidence establishes guilt." (footnote omitted).[5] See Appendix I to Petition at xxii.

Since no federal constitutional error was discussed or decided in *Brock* nor raised in *Thompson*, it is not surprising that the Court of Appeal "deemed that such error did not violate any federal constitutional right." We respectfully submit that the record and the petition are completely inadequate to establish jurisdiction in this Court, and that jurisdiction should therefore be declined.

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[4]In *Brock*, the conviction was reversed because the comment was considered prejudicial in the circumstances of the case.

[5]We believe this interpretation of federal law to be erroneous, as we will discuss *infra*.

II

THE RIGHT TO A JURY TRIAL IS NOT ONE OF THOSE RIGHTS "FUNDAMENTAL AND ESSENTIAL TO A FAIR TRIAL" APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT.

This Court has consistently reiterated the view that the right to trial by jury is not one of those rights so fundamental to a fair trial that it is applicable to the states through the Fourteenth Amendment. See *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *Fay v. New York*, 332 U.S. 261 (1947); *Snyder v. Massachusetts*, 291 U.S. 97 (1934); *Maxwell v. Dow*, 176 U.S. 581, (1899). In *Palko v. Connecticut*, 302 U.S. 319 (1937), the court stated:

> "The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' [citations omitted]. Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them. . . .
>
> "We reach a different plane of social and moral values when we pass to the privileges and immunities that have been taken over from the earlier articles of the Federal Bill of Rights and brought within the Fourteenth Amendment by a process of absorption. These in their origin were effective against the federal government alone. If the Fourteenth Amendment has absorbed them, the process of absorption has had its source in the belief that neither liberty nor justice would exist if they were sacrificed."

Despite these clear and consistent statements, petitioner argues that in *Parker v. Gladden*, 385 U.S. 363 (1966), this Court overruled *Maxwell, sub silentio*, and "held that the Sixth Amendment guarantee of trial by jury applies to criminal proceedings." (Pet. at 10). He urges that in light of the decisions subsequent to *Maxwell* which have made applicable to the states all the other specific guarantees of the Sixth Amendment, it would have been curious indeed if the Sixth Amendment guarantee of jury trial were the only particular in the Sixth Amendment not applicable to state court criminal proceedings." (Pet. at 11).

In our view, petitioner has not only misread *Parker v. Gladden, supra*, but has misinterpreted the import and function of the Sixth Amendment.

In *Parker v. Gladden, supra*, this Court held that a defendant in a state court had the right to be tried by an impartial jury, not that he had a right to choose a jury trial. This holding merely follows prior cases[6], and is fully consistent with the cases cited by petitioner, (Pet. at 11), finding that other specific guarantees of the Sixth Amendment were so fundamental and essential to a fair trial that they are incorporated in the Fourteenth. We submit, however, that it does not follow from this that a state defendant is entitled to choose a jury as the trier of fact.

The guarantees of the Sixth Amendment have been applied to the states through the due process clause of the Fourteenth Amendment not because they are found in the Sixth Amendment, but because they are essential to a fair trial. See *e.g., Pointer v. Texas*, 380 U.S. 400, 403 (1965).

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[6]See, *e.g., Irvin v. Dowd, supra; cf., Tumey v. Ohio*, 273 U. S. 510 (1927).

A defendant is entitled to fairness and due process in a trial even for petty offenses, but in the federal system he is not entitled to a jury. See *Cheff v. Schnackenberg*, 384 U.S. 372 (1966). It can hardly be disputed that the right to confront witnesses, and the right to an impartial judge or jury are essential elements of fairness and have a direct relevance to the integrity of the fact finding process. Where, however, is the intrinsic or logical superiority of a group of twelve laymen as compared to any other number of laymen or to a trained judge or panel of experts?

We are not disputing either the value or the importance of the jury as a traditional concept in Anglo-American justice.[7] California preserves the right to trial by jury more completely than does the federal system. However, if one were to devise *de novo* a system of justice it could not reasonably be said that a lay jury is essential to fairness. Moreover, it would be difficult on a logical basis to justify as the only possibility the common law jury of twelve, the unanimous verdict, or even the traditional divisions of function between the judge and jury.

Petitioner urges that "the fact that [a] right appears in the Sixth Amendment of our Bill of Rights reflects the beliefs of the framers of those liberties and safeguards that [it is] a fundamental right essential to a fair trial in a criminal prosecution." *Pointer v. Texas*, 380 U.S. 400, 404 (1965) (See Pet. at 12). In the constitutional scheme,

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[7]This value, however, is subject to debate. See, *e.g.*, Sebille, *Trial by Jury, an Ineffective Survival*, 10 Am. Bar. J. 53 (1924); Kalven & Zeisel, *The American Jury* 3-11 (1966). Moreover, recent decisions of this Court have suggested an increasing distrust of the jury. See *Jackson v. Denno*, 378 U.S. 368, 405, 430 (1964), (dissenting opinions).

however, it is not the Sixth Amendment which guarantees the jury trial as the method of trying facts in the federal system, but Article III, section 2, clause 3 of the Constitution itself. The meaning of the Sixth Amendment in this framework is clearly to specify the incidents of that trial essential to insure fairness.

Article III, section 2 of the United States Constitution establishes the jurisdiction of United States Courts. Clause 3 of that section provides:

> "The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

The Sixth Amendment to the Constitution establishes the incidents of this trial as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Reading these provisions together, it seems obvious that the right established in the Sixth Amendment in regard to jury trial, was that the jury be both impartial and local. The word "jury" was used, not to repeat a guarantee already made, but because no other form of trial was con-

templated in the federal courts[8] and the first ten amendments as enacted were restrictions only on the federal government. It is significant that no other "right" is duplicated in the Constitution and Amendments; redundancy by the framers in this instance alone is not logically tenable. Since trial by court is now permitted in the federal system, a defendant who waives jury trial surely has a constitutional right to an impartial judge, as well as to an impartial jury.

In *Schick v. United States,* 195 U.S. 65 (1904) Mr. Justice Harlan, dissenting, suggested this interpretation of the relationship of the Article III and the Sixth Amendment:

> "Those who opposed the acceptance of the Constitution said, among other things, that the words of that instrument, strictly construed, (Art. III, § 2) admitted of a secret trial, or of one that might be indefinitely postponed to suit the purposes of the Government, or of one taking place in a State or district other than that in which the crime was committed. The framers of the Constitution disclaimed any such evil purposes; but in order to meet the objections of its opponents, and to remove all possible grounds of uneasiness on the subject, the Sixth Amendment was adopted in which the essential features of the trial required by section 2 of Article III are set forth."

The jury system was imposed on the federal government not only because it had value and was an esteemed institu-

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[8]It should be noted that it was not until 1930 in *Patton v. United States,* 281 U.S. 276 (1930), that this Court definitely decided that jury trial in federal criminal cases could be waived in favor of trial by court. Although this result appears both wise and practical, it hardly comports with the clear language of Article III, § 2(3) of the Constitution.

tion at common law, but because the framers, reflecting the view of the states, were attempting to obviate the pervasive fear of an all powerful, distant and possibly corrupt central government. See, *e.g.*, the Federalist, No. 83 (Hamilton); Declaration of Rights (1774); Declaration of Independence (1776). The jury in this context has value as a reserved power of the local population in the criminal process and as a limitation on the central authority which may or may not be relevant to the different problems of the states.

We submit that the inclusion in the Constitution of a right to trial by jury as a limitation on a feared despotic central government provides insufficient justification for imposing on fifty different states with different problems a rigid system with its essentially arbitrary technical incidents. Such rigidity would not enhance the fundamental fairness of the trial but would stifle needed experimentation and innovation under the "dead hand of the common-law."[9]

> "[B]eyond requiring conformity to standards of fundamental fairness that have won legal recognition this Court always has been careful not so to interpret [the Fourteenth] Amendment as to impose uniform procedures upon the several states whose legal systems stem from diverse sources of law and reflect different historical influences." *Fay v. New York*, 332 U.S. 261, 294 (1947);

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[9]The phrase is taken from *Washington v. Texas*, 388 U.S. 14, 22 (1967).

III

THE COMMENT ON EVIDENCE MADE BY THE JUDGE DID NOT VIOLATE ANY FEDERAL CONSTITUTIONAL RIGHT, NOR WAS IT PREJUDICIAL.

A. Even if trial by jury is a federal constitutional right, the comment was proper.

In *Patton v. United States, supra,* at 288, this Court delineated the essential elements of common law trial by jury: 1) the jury must consist of twelve men; 2) the trial must be in the presence and under the superintendence of a judge having power to instruct the jury as to the law and advise them in respect to the facts; 3) the verdict must be unanimous. Thus, the right and duty of the judge to comment is as essential to a proper jury trial as the unanimous verdict. Wigmore states that such comment "must be regarded historically as an essential and inseparable part of jury trial." 9 Wigmore, *Evidence,* § 2551 (3rd Ed. 1940).

The practice of common law judges reached the degree of advising the jury "as regards the verdict they should give, so that it may accord with his views of the law and of the justice." 3 Christy, *The Practice of Law,* 913 (1835). The practice in the federal courts, although not entirely consistent, has largely been in accord with this view.[10] See, *e.g., Hartzell v. United States,* 72 F.2d 569 (8th Cir. 1934); *United States v. Notto,* 61 F.2d 781 (2nd Cir. 1932); *Dillon v. United States,* 279 Fed. 639 (2nd Cir. 1921); *Savage v. United States,* 270 Fed. 14 (8th Cir. 1920); *Morse v. United States,* 255 Fed. 681 (4th Cir. 1918); *Endelman v. United*

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[10]Cases to the contrary, cited by petitioners, Pet. at 9, n. 3, 4 are based on what we consider to be an entirely erroneous interpretation of *United States v. Murdock,* 290 U.S. 389; (1933).

States, 86 Fed. 456 (9th Cir. 1898). In *Endelman, supra* at 462, the trial judge commented:

> "The federal courts allow the judges sometimes to give an opinion on the evidence. I gave my opinion to the other jury, and I will give it to you. I do not see any way that these defendants can be acquitted. Notwithstanding, I charge you that you are the judges of the evidence, and from that evidence it is for you to say whether or not they, or either of them, are guilty."

Comment in the other cited cases is similar. The comment at issue here is, if anything, more restrained. It contains an expression of opinion, based on the evidence, that the defendant had been proved guilty. In addition, it asserts unequivocally that the jury is the sole judge of the facts. This comment is not only proper, but in view of *Patton*, is an essential part of the court's duty under the common law.

Petitioner cites *United States v. Murdock*, 290 U.S. 389 (1933) in support of his argument that this comment on the evidence was improper. An examination of *Murdock* reveals that the comment together with the court's failure to instruct on the defendant's theory of his defense, resulted, in effect, in the redefinition of the word "wilfully" in the statute to "voluntarily" and was thus erroneous on the law. The Court cited *Horning v. District of Columbia*, 254 U.S. 135 (1920), as an example of a case where such comment would be proper. The facts in *Horning* were not disputed; only their legal effect. In *Horning*, the court's comment was in practical effect, an advised verdict. The court's interpretation of the law, however, was correct. Since the comment in both cases was essentially an instruc-

tion as to what constituted the offense charged, neither one is relevant to the comment at issue here.

There is no reason to assume that by citing one example of proper comment this Court meant that as the only proper case. This would virtually abolish the common law duty, since cases with undisputed facts are seldom found.

> "In the Federal Courts the rule that obtains is similar to that in the English courts, and the presiding judge may, if in his discretion he thinks proper, sum up the facts to the jury; *and if no rule of law is incorrectly stated,* and the matters of facts are ultimately submitted to the determination of the jury, it has been held that an expression of opinion upon the fact is not reviewable on error." *Starr v. United States,* 153 U.S. 614, 624-25 (1894). (Emphasis added)

The court's instructions in the instant case correctly stated the law, no defense was withdrawn from petitioner, and the jury was told that the jury was the exclusive finder of fact. The judge merely informed the jury that in his opinion, based on the evidence, guilt had been proved beyond a reasonable doubt. If the court's comment was given deference and consideration by the jury, this is the purpose of comment under the common law. See *Starr v. United States, supra.* If the essential common law requirement that the judge must have power to advise on the facts is not to be eliminated, then this is eminently proper comment in view of the evidence of guilt presented, and the cautionary instructions given.

B. There was no infringement of the right to an impartial jury.

Petitioner argues that the comment of the judge was a denial of due process, citing *Parker v. Gladden, supra.* In

Parker, a bailiff remarked to a juror, "Oh that wicked fellow, he is guilty." This Court held that such an expression of guilt by one not sworn as a witness and subject to cross-examination deprived the defendant of his right to confrontation and to be tried by an impartial jury. The case is totally inapplicable to the situation at issue here. There was no unsworn witness, nor juror likely to be influenced by extrajudicial knowledge or discussion. We have at issue here only the relationship between the judge and the jury, trying a case solely on the basis of the evidence presented in Court.

Petitioner argues that the situations are similar because petitioner, "relying on the division of functions and assuming that the jury would actually be the trier of fact, made incriminating admissions to the judge after the District Attorney had represented that his statements would not be used against him." Petitioner urges that the judge "who could not help but be influenced by those statements, then expressed his opinion on the guilt of petitioner to the jury." Pet. at 18-19.

The flaw in this reasoning, in addition to what we consider an outrageous assumption regarding the integrity and ability of the judge,[11] is that petitioner's statements to the judge before trial, were not highly incriminating but essentially exculpatory (See RT 12-18). If the judge had believed them, and had improperly considered them, it could only have benefited petitioner.

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[11] *Cf., Federal Trade Com'n v. Cement Inst.*, 333 U.S. 683, 702-03 (1948): "Neither the *Tumey* decision [273 U.S. 510 (1927)] nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law."

In addition, such comment at the time of trial was not error under existing California law. Thus, if petitioner even considered the question, he would have had to assume that the judge could express an opinion on guilt.

The only reason at issue in this case is the relationship of the judge to the jury. Under the common law, the judge's power to comment was extensive. Whether or not that is still the rule or practice has nothing whatever to do with whether the jury is impartial.

C. Even if the comment is considered federal constitutional error, it was harmless by any test.

As we have previously indicated, the Court of Appeal, following *People v. Brock, supra,* found the comment in this case to be error under California law. Applying the California harmless error rule, Calif. Const. Art. VI, § 13, the court affirmed the convictions holding that it was not reasonably proper that a result more favorable to defendant would have been reached in the absence of error.

> "Although the evidence in the instant case was essentially circumstantial, we deem it to be overwhelming. In our opinion the evidence presented by the prosecution, when weighed against the defendant's defense which consisted solely of his own tenuous testimony as to his presence in the vicinity of the Riskin home immediately after the robbery and his possession of the gun in question, is tantamount to evidence which indisputably establishes defendant's guilt."

The conclusion of the Court of Appeal that the evidence in the case was tantamount to indisputable establishment of guilt is fully supported by review of the record. Petitioner was observed, unmasked, by a police officer as he was

leaving the Riskin home; he was found shortly afterwards, hiding in the vicinity; he was identified by the officer as the robber he saw leaving the home; he was wearing clothing as described by the victims and the police officer; he was found in possession of articles stolen from the Riskin home, and they were found not only in the jacket, but in his trousers pockets; when discovered, he attacked the police officers, and finally, a gun found where he was captured was identified as the one which fired a bullet casing found in his room.

Under *Chapman v. California*, 386 U.S. 18 (1967), federal constitutional error is harmless when, beyond a reasonable doubt, the error did not contribute to the verdict.[12] The facts in this case establish guilt conclusively. Petitioner's argument that he "contradicted directly every bit of testimony and every possible inference pointing to guilt," is frivolous. He told a totally unbelievable story. We submit that the error is harmless not just beyond a reasonable doubt, but to a near certainty. It is utterly inconceivable that the jury would have reached a different verdict, had no comment been made.

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[12]Since error here, if any, did not affect the basic fairness of the trial, it cannot be said that it is *per se* prejudicial. See *Chapman* at 23.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
April 12, 1968.

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